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No. 96-1469

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

HERNAN RAMIREZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether police officers must possess more specific evidence of danger to themselves or others in order to justify a no-knock entry in which they damage a door or window than would be required to justify a no-knock entry made without damage to property.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 91 F.3d 1297. The opinion of the district court (Pet. App. 28a-38a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1996. A petition for rehearing was denied on November 15, 1996 (Pet. App. 48a). On February 4, 1997, Justice O'Connor extended the time for filing a petition for a writ of certiorari until March 15, 1997 (a Saturday). The petition was filed on March 17, 1997, and was granted June 23, 1997 (117 S. Ct. 2478). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 3109 of Title 18 of the United States Code provides:

> **Breaking doors or windows for entry or exit**
>
> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

STATEMENT

A grand jury in the District of Oregon returned an indictment charging respondent with possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). Respondent moved to suppress evidence obtained during a search of his residence, including the two firearms that formed the basis for the offense charged in the indictment. The district court granted the motion. Pet. App. 28a-38a. The court of appeals affirmed. *Id.* at 1a-27a.

1. On November 2, 1994, while en route to testify at a state criminal trial, federal inmate Alan Lawrence Shelby slipped out of his handcuffs, assaulted a deputy sheriff, and escaped from custody. At the time, Shelby was serving concurrent sentences for federal drug and firearms violations, and for a state armed robbery conviction. Pet. App. 2a, 32a-33a. On November 4, 1994, Deputy U.S. Marshal Wayne Kauffmann applied for a warrant to search respondent's residence in Boring, Oregon, for Shelby. *Id.* at 41a. The affidavit in support of the warrant application recounted that a reliable confidential informant had seen a person believed to be Shelby at respondent's residence. The person had been introduced to the informant as "Alan," and had stated in the informant's presence, "I had to knock out a guard." *Id.* at 39a. According to the affidavit, after the agent received that information, the informant and an agent with the Bureau of Alcohol, Tobacco, and Firearms had driven past respondent's residence and seen a man "who they believed to be * * * Shelby, outside the residence." *Id.* at 39a-40a. Deputy Marshal Kauffmann's affidavit further stated that he had then driven to respondent's residence and seen someone who, Kauffmann believed, was the same person seen by the ATF agent. *Id.* at 40a.

The affidavit also described the basis for Deputy Marshal Kauffmann's belief that "Shelby is an extreme danger to law enforcement officers." Pet. App. 41a. In particular, it stated that Shelby had previously been convicted of conspiracy to manufacture methamphetamine, possession of methamphetamine with intent to distribute it, and using or carrying a firearm during and in relation to a drug trafficking offense; that Shelby "had a history of violent

escapes"; and that Shelby had stated that he would not "do federal time." *Id.* at 38a.

According to the affidavit, in 1991 Shelby had attempted to escape from custody "by striking a corrections officer in the face and kicking out the door of the jail. Shelby ran from the jail and assaulted a woman in a parking lot and stole her vehicle. During the escape attempt, Shelby rammed a police vehicle with the stolen vehicle." Pet. App. 38a. The affidavit further stated that Shelby "has made threats to kill witnesses and police officers associated with his incarceration" and that he "has brutally tortured others in the past with a hammer." *Id.* at 38a-39a. Finally, the affidavit stated that Shelby "has had access to large caches of weapons." *Id.* at 39a. See also *id.* at 33a.

Based on the information in the affidavit, a magistrate judge issued a warrant to search respondent's residence for Shelby. The warrant expressly provided that, "because of exigent circumstances shown in the application, you are authorized to enter the premises without complying with the Knock-and-Announce requirement." C.A. E.R. 27.

Before they executed the warrant, officers learned from the informant that respondent "was possibly involved in drugs, which he kept in the garage," and that "there were supposed to be several guns in [respondent's] garage." Pet. App. 3a, 33a, 43a-44a. On November 5, 1994, at about 6:15 a.m., approximately 45 law enforcement officers surrounded respondent's house. Using a loudspeaker, a police officer announced the officers' presence and ordered the occupants of the dwelling to come out. At the same time, a police officer broke open the window of the garage attached to the house, while another officer shouted

"Sheriff's Office, Search Warrant." *Id.* at 3a-4a, 29a, 44a.

Awakened by the police activity, respondent initially thought that his house was being burglarized. He ran to a closet, obtained a gun, and fired it into the ceiling. A short time later, respondent realized that the police had surrounded the house, and he surrendered. After receiving and waiving his *Miranda* rights, respondent admitted that he was a convicted felon and that he owned the gun that he had fired, as well as another firearm. Respondent further admitted that a man resembling Shelby had been at his house two days earlier. Based on respondent's statement, and the officers' observation of the gun respondent had fired, the officers obtained a second search warrant and seized the two firearms. Pet. App. 4a, 29a, 45a-46a.

2. Respondent was charged with possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). He moved to suppress the firearms seized from his house, and the district court granted the motion. Pet. App. 28a-36a. The court found that the warrant to search respondent's house for Shelby was supported by probable cause. *Id.* at 30a-31a. It concluded, however, that the officers had violated the federal knock-and-announce statute, 18 U.S.C. 3109, and the Fourth Amendment because their reasons for making an unannounced entry were insufficient to justify breaking the window of respondent's garage as they announced their presence. Pet. App. 31a-35a.

The court stated that, under Ninth Circuit precedent, "mild exigency, such as knowledge that a person is dangerous, can justify an immediate entry that is done without physical destruction of property," but an "entry that is accomplished by physical destruction of

property [requires] more specific inferences of exigency." Pet. App. 32a (citing *United States* v. *Becker*, 23 F.3d 1537, 1540 (9th Cir. 1994)). The court acknowledged that "there were specific facts known regarding Shelby's propensity to attempt escape, his disdain for federal incarceration, and his past willingness to use threats and violence as a means of intimidation." *Id.* at 34a. Those facts, the court concluded, presented "sufficient exigent circumstances to have allowed immediate entry into [respondent's] residence where entry could be obtained without physical destruction of property." *Id.* at 33a.

The court held, however, that the government had not demonstrated sufficient exigency to justify breaking respondent's window during the search because "there was no information that [Shelby] was armed and dangerous at [respondent's] home, or that he would present any specific dangers to arresting officers if found there." Pet. App. 34a. In the court's view, the officers' decision to break a garage window in the course of serving the warrant, "although prompted by a knowledge of Shelby's past, was not sufficiently supported by circumstances suggesting that the fugitive posed a particular danger to others during this attempted apprehension." *Id.* at 34a-35a. Because it concluded that the bases for the second search warrant, and the subsequent seizure of respondent's firearms, were "direct consequences of the manner in which the first warrant was executed," the court ordered that the weapons be suppressed. *Id.* at 35a.

3. A divided panel of the court of appeals affirmed. Pet. App. 1a-27a. The majority stated that "exigent circumstances can justify breaking into a house without notice," but "[w]hen exigency is claimed, we

must determine what kind of exigency it was." *Id.* at 8a.

Like the district court, the majority employed the two-tier analysis required by circuit precedent. It explained that, while "even a mild exigency, like knowledge that a person is dangerous, can justify immediate entry where that can be done without any physical disruption of property," Pet. App. 8a (quoting *Becker*, 23 F.3d at 1540), "[m]ore specific inferences of exigency are necessary" where the destruction of property is involved, *ibid.* (quoting *Becker*, 23 F.3d at 1541).

Applying that test, the majority held that a sufficient level of exigency had not been shown here:

> The 45 officers did not fear any of the actual residents of the house and were not attacking a gang or cult hangout where they might be met by a fusillade of gunfire. They were concerned about one person, Shelby, who might be on the premises. But Shelby was not known to have ever shot or shot at anyone. He was an escape artist, who said he would not go to federal prison. He had knocked people down in his escape attempts, and he had stolen a car and run into a police vehicle. His violence towards law enforcement had not extended beyond that, even though he had obviously been arrested on some occasions. Perhaps his degree of dangerousness bespoke a mild exigency. Certainly it did not bespeak more.

Pet. App. 9a. Because it found that the government had failed to adduce "specific evidence that Shelby was armed, that he would use firearms against the officers, or that when he was faced with [a] show of force he would do anything violent at all," *id.* at 11a-

12a, the court concluded that respondent's "statutory and Fourth Amendment rights were violated when government agents broke into his [house] in the early morning hours without complying with the knock-and-announce requirements," *id.* at 17a.[1]

Judge Kozinski dissented. Pet. App. 18a-27a. He argued that "the record contradicts the majority's romantic description of Shelby," who was, in Judge Kozinski's view, "a hardened and desperate criminal." *Id.* at 18a. Judge Kozinski emphasized that the officers knew that Shelby had "a history of violent escapes," had "[a]ssault[ed] helpless citizens" and law enforcement officers in effecting those escapes, and had engaged in "brutal[] tortur[e]." *Id.* at 19a-20a. The dissent further observed that officers had specific information about Shelby's access to firearms. *Id.* at 20a. Based on those facts, the dissent argued that the officers had "properly balanced the homeowner's privacy and property interests against the dictates of security." *Id.* at 23a-24a (citing *Wilson* v. *Arkansas*, 514 U.S. 927, 934 (1995)).[2]

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[1] The majority further concluded that the "seizure of the guns * * * came as the most direct, if not the only, result of the" police "break-in," and that "suppression would serve to dissuade the police from this kind of unnecessary invasion of people's homes." Pet. App. 13a.

[2] Judge Kozinski also dissented on the ground that, "[e]ven had the no-knock search been illegal, this would provide no grounds for suppression of the evidence pertaining to [respondent]." Pet. App. 24a.

SUMMARY OF ARGUMENT

This Court's decisions make clear that the question whether officers may make an unannounced, no-knock entry turns on whether the officers reasonably believe that giving prior notice of their presence and purpose, and providing a grace period for occupants to open the door, would expose the officers to a risk of danger, would facilitate a fugitive's escape, or would likely prompt the destruction of evidence. *Richards* v. *Wisconsin*, 117 S. Ct. 1416, 1421 (1997); *Wilson* v. *Arkansas*, 514 U.S. 927, 934 (1995). In overcoming the general requirement of knock and announcement, therefore, the government must show that the "countervailing law enforcement interests" of the officers executing the warrant outweigh the privacy interests of the occupants of the dwelling to be searched. *Wilson*, 514 U.S. at 934.

The Ninth Circuit has concluded that, when officers break property to effect a no-knock entry, that action significantly elevates the showing of potential harm to officers required to justify the entry. While a "mild exigency" justifies unannounced entries in which property is not damaged, even minor damage to property requires officers to have "[m]ore specific inferences of exigency." Pet. App. 8a. The Ninth Circuit's two-tier approach to no-knock entries is incorrect, because it erroneously makes property damage the determinant of how specifically officers must be able to infer a risk of danger before they may make a no-knock entry. The constitutionality of the decision to enter unannounced should not be influenced by the officers' need to damage property in effecting entry. Because officers cannot foresee the precise means of gaining control in dangerous and risky circum-

stances, they "are often forced to make split-second judgments * * * about the amount of force that is necessary in a particular situation." *Graham* v. *Connor*, 490 U.S. 386, 397 (1989).

The court of appeals' approach also conflicts with the deference this Court has afforded to officers to exercise discretion when faced with unknown dangers. Officers frequently employ tactics that involve minimal damage to property to enhance the element of surprise and tactical control of the situation. The Ninth Circuit's rule unjustifiably calls into question such tactics when officers do not have heightened evidence of exigency.

That is not to say that destruction of property has no place in analyzing the reasonableness of the entry. Excessive or wholly unnecessary destruction of property by law enforcement officers in the execution of a warrant may violate the Fourth Amendment's reasonableness standard. But whether such property damage occurred is not a relevant consideration in assessing whether the officers were justified in deciding to effect a no-knock entry in the first place.

Under a proper analysis, the decision to enter unannounced in this case was constitutional. The officers not only had a warrent for an escaped convict, but they had a reasonable suspicion that he would violently resist apprehension. That convict had a history of violent encounters with officers and ready access to weapons. The fugitive was also known to be determined to avoid capture and to have a past conviction for use of weapons in drug-related offenses. The officers' decision to effect a sudden entry to neutralize the risks of violence posed was reasonable.

Respondent suggests that the reasonableness of the no-knock entry should be judged with reference to

the totality of the circumstances. This Court has held that the totality of the circumstances bears on whether a particular law enforcement practice constitutes a "search" or "seizure." In this case, the issue is not whether a search occurred, however, but rather whether the unannounced entry to execute the warrant was reasonable. The Court has also looked to the totality of the circumstances in addressing whether probable cause or reasonable suspicion existed in a particular case. In that setting, the reasonableness of the police officers' action is measured not by events that occur after officers have chosen to make an intrusion. Rather, it turns on an objective analysis of information available to the officers at the time they decide to make the intrusion in question. The same principle applies here; property damage that occurs after officers decide to effect an unannounced entry is not relevant to whether the decision itself was justified.

Even if this Court were to apply a totality-of-the-circumstances analysis that considered property damage as one factor, that standard is satisfied here. The only additional intrusion into respondent's privacy interests by the officers' unannounced entry was the damage to the garage door windowpane. That interference with property interests was *de minimis* and outweighed by the reasonable justifications given by the officers for making an unannounced entry.

ARGUMENT

THE OFFICERS' DECISION TO MAKE A NO-KNOCK ENTRY WAS REASONABLE, NOTWITHSTANDING THAT THEY DAMAGED PROPERTY IN EFFECTING THE ENTRY

"[T]he reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering." *Wilson* v. *Arkansas*, 514 U.S. 927, 931 (1995). "The Fourth Amendment's flexible requirement of reasonableness," however, "should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests." *Id.* at 934. When officers have a reasonble suspicion that a prior announcement would create a threat of violence, invite the destruction of evidence, or risk the escape of a suspect, an unannounced entry is constitutionally reasonable. *Richards* v. *Wisconsin*, 117 S. Ct. 1416, 1421 (1997); *Wilson*, 514 U.S. at 936. The issue is whether law enforcement needs justify a sudden entry. Contrary to the Ninth Circuit's rule, the fact that property is damaged in the course of the entry does not elevate the burden on officers to justify their decision to make an unannounced entry in the first place.

A. An Unannounced Entry Is Reasonable When Legitimate Law Enforcement Interests Justify Dispensing With Announcement

In *Wilson* v. *Arkansas*, this Court concluded that the common law requirement that officers announce their identity and purpose before entering a home forms part of the Fourth Amendment inquiry into the reasonableness of the officers' entry. 514 U.S. at 931. The knock-and-announce principle furthers three

interests. First, it protects "the individual privacy interests intruded upon by a no-knock entry." *Richards*, 117 S. Ct. at 1421. Although the search or arrest warrant itself justifies a significant intrusion on the occupants' privacy interests, an announcement before entry tempers the suddenness of the invasion of privacy. See *id.* at 1421 n.5. Second, a prior announcement protects officers from the possibility that occupants will take violent defensive action based on the mistaken assumption that a criminal intruder is at the door. *Sabbath* v. *United States*, 391 U.S. 585, 589 (1968). Third, a knock before entry prevents needless damage to the door of the home by giving occupants an opportunity to admit the officers peacefully. *Miller* v. *United States*, 357 U.S. 301, 307, 313 (1958); 2 Wayne R. LaFave, *Search and Seizure* § 4.8(a), at 599 (3d ed. 1996).[3]

Wilson made clear that the knock-and-announce principle is not an absolute requirement, but may be overcome by "countervailing law enforcement interests." 514 U.S. at 934. Without delineating "a comprehensive catalog" of the factors that could overcome the "presumption in favor of announcement," the Court noted that an unannounced entry may be justified in such circumstances as when officers face "a threat of physical violence," *id.* at 936, "where police officers have reason to believe that evidence would likely be destroyed if advance notice were given," *ibid.*, and "where a prisoner escapes * * * and retreats to his dwelling," *ibid.* (citing *Reed* v.

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[3] In the event that the police have come to the wrong address, a prior announcement and period of delay before entry would also permit occupants to advise the police of that fact.

Case, 4 Conn. 166, 170 (1822) (plaintiff who "had resolved * * * to resist even to the shedding of blood * * * was not within the reason and spirit of the rule requiring notice")). The Court left it to the lower courts in the first instance to elucidate when "law enforcement interests may * * * establish the reasonableness of an unannounced entry." 514 U.S. at 936.

In *Richards* v. *Wisconsin*, the Court provided additional guidance on the circumstances that justify an unannounced entry. The Court rejected a blanket exception to the knock-and-announce requirement when officers execute search warrants in felony drug investigations. 117 S. Ct. at 1418. The Court acknowledged, however, that unannounced entries may be justified when law enforcement needs override the privacy concerns protected by the knock-and-announce principle.

> In order to justify a "no-knock" entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence. This standard—as opposed to a probable cause requirement—strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries.

Id. at 1421-1422.[4]

[4] Before *Richards*, the federal courts of appeals generally characterized the circumstances that may justify dispensing with a prior announcement as "exigent circumstances." See, *e.g.*, *United States* v. *Stowe*, 100 F.3d 494, 499 (7th Cir. 1996), cert. denied, 117 S. Ct. 1438 (1997); *United States* v. *Maden*, 64 F.3d 1505, 1509 n.2 (10th Cir. 1995); *United States* v. *Brown*, 52 F.3d 415, 421 (2d Cir. 1995), cert. denied, 116 S. Ct. 754 (1996); *United States* v. *Kennedy*, 32 F.3d 876, 882 (4th Cir. 1994), cert. denied, 513 U.S. 1128 (1995); *United States* v. *Lalor*, 996 F.2d 1578, 1584 (4th Cir.), cert. denied, 510 U.S. 983 (1993). *Richards* establishes, however, that the proper analysis is whether the officers have "reasonable suspicion" that a knock and announcement would be futile, or would lead to danger or a loss of evidence. 117 S. Ct. at 1421; see *id.* at 1422 (adding that "[t]his showing is not high"). *Richards* itself, which upheld the no-knock entry involved in that case, did not refer to "exigent circumstances." *Ibid.* The phrase "exigent circumstances" can lead to some confusion in evaluating the reasonableness of unannounced entries, see Pet. 18 n.8, and, under *Richards*, it is no longer appropriate to require "exigent circumstances" in this context.

B. The Fact That Property Is Damaged In Effecting An Unannounced Entry Does Not Require Officers To Have More Specific Knowledge Of Danger To Officers

The court of appeals adopted an incorrect approach to evaluating the reasonableness of unannounced entries. While permitting the police to justify unannounced entries with "even a mild exigency" if they did not break property in entering, the court of appeals held that a higher showing is required if the unannounced entry entails even minor "physical disruption of property." Pet. App. 8a (quoting *United States* v. *Becker*, 23 F.3d 1537, 1540 (9th Cir. 1994)). See also *United States* v. *McConney*, 728 F.2d 1195, 1206 (9th Cir.) (en banc), cert. denied, 469 U.S. 824 (1984). Under that two-tier approach, where property is damaged during a no-knock entry to execute a warrant, officers must demonstrate "[m]ore specific inferences of exigency" (Pet. App. 8a) than would other-

wise be required. The court of appeals' focus on property damage in determining the level of justification needed to support a no-knock entry is erroneous.

1. As the Court recognized in *Wilson*, the validity of an unannounced, no-knock entry depends on the law enforcement interests that exist when officers enter the premises in question. 514 U.S. at 934-937. *Richards* holds that the test is whether police have "reasonable suspicion" that a prior announcement would threaten those law enforcement interests. 117 S. Ct. at 1421. That judgment, the Court explained in *Richards*, "must be evaluated as of the time [the officers] entered." *Id.* at 1422. Neither *Wilson* nor *Richards* suggests that the reasonableness of the decision to make an unannounced entry may turn on whether property is damaged at some point in the entry.[5]

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[5] In *Wilson*, the State argued that the unannounced entry was valid because the officers feared that a prior announcement would expose them to peril or would have produced a risk of destruction of evidence. 514 U.S. at 937. The Court remanded, noting that "[t]hese considerations may well provide the necessary justification for the unannounced entry in this case." *Ibid.* Although the entry had been effected by the officers' "opening an unlocked screen door" without any apparent damage to property, *id.* at 929, the Court did not suggest that that fact would play a role in the reasonableness analysis to be conducted on remand. In *Richards*, this Court itself found that the unannounced entry was supported by reasonable suspicion, and therefore affirmed "the reasonableness of the officers' decision" to make "a no-knock entry." 117 S. Ct. at 1422. Although the officers entered by "kicking and ramming the door to gain entry to the locked room," *id.* at 1419, the Court did not indicate that the existence of property damage elevated the showing required to justify the officers' decision to make an unannounced entry.

Under a proper analysis, the need to damage property in making an unannounced entry has no bearing on the presence of the law enforcement interests that justify that entry. When the requisite peril to officers exists, or other risks make it reasonable for officers to employ the element of surprise, the decision to enter without a prior knock and announcement is valid. The fortuity of an unlocked door or open window should not determine whether the officers may execute an unannounced entry. Officers may not know whether it will be hard or easy to enter a house until they are literally on the doorstep. Thus, they "are often forced to make split-second judgments * * * about the amount of force that is necessary in a particular situation." *Graham* v. *Connor*, 490 U.S. 386, 397 (1989). Cf. *Dalia* v. *United States*, 441 U.S. 238, 257 n.19 (1979) ("[O]ften it is impossible to anticipate when [it] will be necessary" for officers to engage in "forceful breaking [in order] to effect a warranted search."). The justification for the immediate entry is the need for surprise; that need does not diminish simply because it may be necessary to damage property to enter the premises.

The question whether an unannounced entry is justified, therefore, should turn on whether law enforcement interests would be jeopardized by giving advance warning, not on whether property is damaged during the entry. And where "knowledge that a person is dangerous" (Pet. App. 8a) would justify unannounced entry through an open door or window, no greater or more specific showing should be required merely because a locked door or window makes a

degree of property damage necessary to safe execution of the warrant.[6]

2. The Ninth Circuit's rule is inconsistent with general Fourth Amendment principles, which make clear that the "'principal' object of the [Fourth] Amendment is the protection of privacy rather than property." *Soldal* v. *Cook County*, 506 U.S. 56, 64 (1992); *Warden* v. *Hayden*, 387 U.S. 294, 304 (1967). In requiring reasonable suspicion before officers may

[6] We have found no authority in state statutory law requiring a showing of greater justification on the part of officers to make a no-knock entry to execute a warrant when to do so involves damage to property. See, *e.g.*, Me. R. Crim. P. 41(i) (West 1997); Okla. Stat. Ann. tit. 22, § 1228 (West 1996). Case law in only two States, Alabama and Nebraska, considers property damage as a factor in evaluating the degree of exigency required. See *State* v. *Moore*, 535 N.W.2d 417, 422-423 (Neb. Ct. App. 1995) (agreeing with Ninth Circuit approach and requiring officers to make showing of greater risk of danger when physical destruction of property is necessary); *State* v. *Ogden*, 640 A.2d 6, 9-10 (Vt. 1993) (holding that exigency may justify non-forceful entry and leaving open level of justification required if forceful entry is made).

The predominant rule among the States is that officers may dispense with knock and announcement when to give notice will increase the risk of peril to the officers or the likelihood that evidence will be destroyed. No additional requirement is imposed when destruction of property will occur in making the unannounced entry. See, *e.g.*, *People* v. *Ackerman*, 654 N.Y.S.2d 876, 877 (App. Div. 1997), appeal denied, 89 N.Y.2d 1087 (May 5, 1997); *People* v. *Krueger*, 675 N.E.2d 604, 608, 610 (Ill. 1996), petition for cert. pending, No. 96-1786 (filed May 9, 1997); *State* v. *Stevens*, 511 N.W.2d 591, 595-596 (Wis. 1994), cert. denied, 515 U.S. 1102 (1995); *Commonwealth* v. *Rodriguez*, 614 N.E.2d 649, 651-652 (Mass. 1993); *State* v. *Matos*, 605 A.2d 223, 224-225 (N.H. 1992); *State* v. *Piller*, 628 P.2d 976, 978-979 (Ariz. Ct. App. 1981); *Commonwealth* v. *Cundriff*, 415 N.E.2d 172, 178 (Mass. 1980), cert. denied, 451 U.S. 973 (1981).

take protective actions in other search-and-seizure contexts, this Court has never required a greater justification on the officers' part if their action—intentionally or unintentionally—results in damage to property. For example, a pat-down search does not require probable cause (as opposed to reasonable suspicion) simply because the officer tears a pocket on the suspect's jacket. Cf. *Terry* v. *Ohio*, 392 U.S. 1 (1968). Nor is the decision to make a protective sweep of a house invalid if an officer should break an object while conducting the search. Cf. *Maryland* v. *Buie*, 494 U.S. 325 (1990). Similarly, a search warrant will not be invalidated even if the manner of its execution is called into doubt. See *Maryland* v. *Garrison*, 480 U.S. 79, 84 (1987). By the same reasoning, the need to damage or destroy property in making an unannounced entry should not impose on officers the burden to justify their decision by more than reasonable suspicion that peril to themselves or destruction of evidence may occur if they knock and announce their presence.

That conclusion draws additional support from this Court's holding that breaking of property in effecting an unannounced entry is not necessary to trigger the federal knock-and-announce statute, 18 U.S.C. 3109. *Sabbath* v. *United States*, 391 U.S. 585 (1968).[7] Al-

[7] Although *Sabbath* involved Section 3109, both that provision and the Fourth Amendment incorporate the common law announcement principle—and the acknowledged grounds for dispensing with a prior announcement. See *Wilson*, 514 U.S. at 934 n.3 (noting that in *Sabbath*, 391 U.S. at 591 n.8, the Court suggested that both the "'common law' rule of announcement and entry and its 'exceptions' were codified in § 3109"). Accordingly, precedents interpreting Section 3109 are relevant to analysis of the constitutional issue, and, by the same token,

though Section 3109 uses the phrase "break open," the Court explained that "[a]n unannounced intrusion into a dwelling—what § 3109 basically proscribes—is no less an unannounced intrusion whether officers break down a door, force open a chain lock on a partially open door, open a locked door by use of a passkey, or * * * open a closed but unlocked door." *Id.* at 590; see also *ibid.* ("The protection afforded by, and the values inherent in, § 3109 must be governed by something more than the fortuitous circumstance of an unlocked door.") (internal quotation marks omitted). *Sabbath* teaches that the central value protected by the knock-and-announce rule is "the reverence of the law for the individual's right of privacy in his house." *Id.* at 589 (quoting *Miller*, 357 U.S. at 313). Consistent with a recognition that that value is not absolute, the Court in *Sabbath* examined the no-knock entry in that case to determine whether "lack of compliance with the statute is excused because an announcement might have endangered the informant * * * or the officers themselves." *Id.* at 591. The Court rejected that submission because of a lack of "substantial basis for excusing" the failure to announce. *Ibid.* The Court did not suggest that, because no property was damaged, a "mild exigency" would have sufficed to justify the unannounced entry.

3. The court of appeals' approach is also disruptive to law enforcement and increases the risk of harm faced by officers executing warrants. Under the Ninth Circuit's two-tier inquiry, the breaking of *any* property automatically increases the burden on the

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Section 3109 does not impose a more stringent burden on federal law enforcement officers than is imposed by the Fourth Amendment.

officers to possess "more specific inferences" of danger or other harms that warrant an unannounced entry. The court of appeals has suggested that such inferences would include proof that "evidence was being destroyed," *United States* v. *Whitney*, 633 F.2d 902, 910 (9th Cir. 1980), cert. denied, 450 U.S. 1004 (1981), or "specific information [that a dwelling's resident] was armed and dangerous," *Becker*, 23 F.3d at 1541. Because such specific inferences are ordinarily unavailable to officers before they decide to enter a dwelling unannounced, the court of appeals' rule would require officers to forgo unannounced entries to execute search warrants, even where the available facts strongly support the use of surprise to reduce risks to officers.[8]

Executing search warrants is often highly dangerous. To minimize those dangers, officers sometimes break a window to distract the occupants and thereby increase the officers' ability to gain quick control of the situation. By drawing the occupants' attention to the sound of breaking glass, officers may be able to divert the occupants into less threatening positions, gain control of their movements, and reduce the risk of violence. Cf. *Michigan* v. *Summers*, 452 U.S. 692, 702-703 (1981) ("The risk of harm to both the police

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[8] The burdens placed on law enforcement officers by the "specific inferences" test are well demonstrated by this case. Here, although the escaped-fugitive Shelby had previously struck a corrections officer in the face to effect an escape, had stolen a car and rammed it into a law enforcement vehicle, had threatened to kill witnesses, had tortured another person with a hammer, had vowed not to serve federal time, and had access to weapons, the court of appeals surmised that "[p]erhaps" Shelby's "degree of dangerousness bespoke a mild exigency. Certainly it did not bespeak more." Pet. App. 9a.

and the occupants is minimized if the officers routinely exercise unquestioned command of the situation."). On other occasions, officers may use distraction devices that emit a bright flash of light and a loud noise in order to divert the inhabitants' attention away from the officers' point of entry. Such devices—which are designed precisely to reduce the threat of violence to officers, inhabitants, and the public—often require minor property damage such as the breaking of a window. See, *e.g.*, *United States* v. *Dahlman*, 13 F.3d 1391, 1394 & n.3 (10th Cir. 1993), cert. denied, 511 U.S. 1045 (1994). Officers should not be required to forgo the employment of such tactics simply because they cannot meet the stringent showing imposed by the court of appeals. As Judge Newman once observed:

> Armchair experts may differ as to whether a police officer apprehending a suspect believed to be armed and dangerous incurs less risk by breaking in unannounced or by securing the area and giving notice from a safe distance. Experience has shown that either course can precipitate injury and death. The Fourth Amendment is not the arbiter of this choice of tactics.

United States v. *Cognato*, 408 F. Supp. 1000, 1005 (D. Conn.), aff'd, 539 F.2d 703 (2d Cir. 1976), cert. denied, 430 U.S. 956 (1977).

This Court has afforded deference to the contemporaneous assessment by police officers of the violent risks they face. The Court has frequently noted the "weighty interest in officer safety," *Maryland* v. *Wilson*, 117 S. Ct. 882, 885 (1997), and, in recognition of that interest, has never required absolute assurance that a particular situation would threaten officers' safety to justify a measured intrusion on Fourth Amendment interests. See, *e.g.*, *Buie*, 494 U.S. at 336 ("protective sweep" of house justifiable based on "reasonable suspicion of danger"); *Michigan* v. *Long*, 463 U.S. 1032, 1049 (1983) ("protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger"); *Michigan* v. *Summers*, 452 U.S. at 702-703 ("interest in minimizing the risk of harm to the officers" justifies detaining occupant of premises while search is conducted); *Pennsylvania* v. *Mimms*, 434 U.S. 106, 110 (1977) (per curiam) (relying on "inordinate risk confronting an officer" to justify requirement that driver exit car in a traffic stop); *Chimel* v. *California*, 395 U.S. 752, 763 (1969) (search incident to arrest justified on ground that, without search, "officer's safety might well be endangered"). The "specific inferences" required by the court of appeals would expose officers to heightened risks in the particularly dangerous setting of warrant execution. That rule conflicts with the consistent view of this Court that, "[c]ertainly, it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties." *Terry*, 392 U.S. at 23.

4. Although the Ninth Circuit's consideration of property damage in no-knock entries is incorrect, the fact that property is destroyed does have a place in analyzing the reasonableness of the entry. Damage to the premises entered, even significant damage, should not elevate the burden on law enforcement officers to show the reasonable suspicion that justifies their decision to enter unannounced. But excessive or wholly unnecessary destruction of property by law enforcement officers in the execution of a war-

rant may violate the Fourth Amendment's reasonableness standard.[9]

Officers must have considerable leeway in determining the degree of force needed to effectuate an entry. Compare *Graham* v. *Connor*, 490 U.S. at 396-397. But there is a "longstanding requirement[] that the officers * * * avoid *unnecessary* damage to the premises." 2 LaFave, *supra*, § 4.10(d), at 673-674 (emphasis added); *United States* v. *Kemp*, 12 F.3d 1140, 1142 (D.C. Cir. 1994) (interests advanced by statutory knock-and-announce requirement include "preventing *needless* destruction of private property") (emphasis added); *Buckley* v. *Beaulieu*, 104 Me. 56, 61 (1908) (where officers unnecessarily destroyed walls of suspect's home, "the manner and extent of the search in this case were unreasonable and in excess of the officers' authority"). Thus, even when an unannounced entry is justified to protect the officers' safety or to foil an escape, the no-knock entry must still be carried out in a reasonable manner, involving a proportionate amount of force.

Courts should not lightly second-guess how much force is reasonable. But just as officers may not use excessive force in making an otherwise valid probable-cause arrest, see *Graham* v. *Connor*, 490

[9] That consideration of property damage reflects the fact that one of the interests underlying the knock-and-announce principle is the avoidance of needless damage to property. See *Wilson* v. *Arkansas*, 514 U.S. at 931; *Richards*, 117 S. Ct. at 1421 n.5. That interest implicates the *manner* in which the unannounced entry is made, rather than *whether* the decision to enter unannounced is reasonable. As this Court has noted, "the reasonableness of a [law enforcement action being challenged] depends not only on *when* it is made, but also on *how* it is carried out." *Graham* v. *Connor*, 490 U.S. at 395.

U.S. at 397, they may not destroy property unnecessarily in making an otherwise-valid unannounced entry. At the same time, the use of excessive force in making an arrest does not invalidate the probable cause that supported the initial decision to arrest. Similarly, in the context of an unannounced entry, the excessive breakage of property in making an entry does not invalidate the reasonable suspicion that supported the initial decision to dispense with a prior knock and announcement.

C. The No-knock Entry In This Case Was Valid Based On The Reasonable Suspicion That The Fugitive Sought By The Warrant Might Pose A Threat Of Violence

As we have shown, a proper analysis of the entry in this case considers, first, whether the officers had reasonable suspicion to justify dispensing with an announcement before entry, and, second, whether any breakage of property during the entry was excessive under the circumstances. Applying that test, the entry in this case complied with the Fourth Amendment and Section 3109. The warrant to search respondent's property was based on probable cause to believe that Shelby was hiding there. Pet. App. 30a-31a.[10] In addition, the officers executing the warrant had reliable information that (1) Shelby had been convicted of a number of felonies, including using or carrying a firearm during and in relation to a drug trafficking offense; (2) Shelby "had a history of violent escapes," and had stated that he would not "do federal time"; (3) Shelby had attacked officers

[10] The court of appeals expressed some doubt about that proposition, but it decided this case on the assumption that probable cause was established. Pet. App. 12a n.1.

and innocent bystanders in past escape attempts; (4) Shelby "ha[d] made threats to kill witnesses and police officers associated with his incarceration"; (5) Shelby "has had access to large caches of weapons"; (6) respondent Ramirez "was possibly involved in drugs, which he kept in the garage"; and (7) "there were supposed to be several guns in [respondent's] garage." *Id.* at 32a-33a, 38a-39a, 43a-44a. Based on that knowledge, the officers had ample reason to conclude that a risk of violence would arise if they announced their presence before entry, and that making an unannounced entry would significantly reduce that risk. The officers were therefore justified in making a no-knock entry, whether or not the manner of entry required some damage to property.[11]

Not only was the unannounced entry justified, but the damage to respondent's property was neither gratuitous nor excessive. Rather, the minimal step of breaking the window to respondent's garage simultaneously with announcement and entry was a reasonable way both to obtain entry and to draw the occupants to a position away from the doors, thus facilitating the officers' ability to control the search scene. Accordingly, the manner of entry in this case was lawful.

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[11] The fact that the officers did not find Shelby does not undercut the reasonableness of their actions at the time. "It goes without saying that in determining the lawfulness of entry * * * we may concern ourselves only with what the officers had reason to believe *at the time of their entry.*" *Ker* v. *California*, 374 U.S. 23, 40 n.12 (1963) (plurality opinion); cf. *Illinois* v. *Rodriguez*, 497 U.S. 177, 186 (1990).

D. The Officers' No-knock Entry Was Reasonable Even Under A Totality-Of-The-Circumstances Analysis

Respondent has suggested that the officers' conduct in effectuating a no-knock entry was unreasonable in view of the totality of the circumstances. See Br. in Opp. 30. A totality-of-the-circumstances test that includes property damage as one factor should not be employed here, for many of the reasons why the Ninth Circuit's two-tier approach should be rejected. But even if such a totality-of-the-circumstances test were applicable, the entry in this case should be held reasonable.

1. This Court has often looked to the totality of the circumstances in evaluating police conduct. The totality of the circumstances bears on whether a particular police action constituted a "search" or "seizure" within the meaning of the Fourth Amendment. See, *e.g.*, *Ohio* v. *Robinette*, 117 S. Ct. 417, 421 (1996) (whether driver of automobile is "free to leave" or is "seized"); *Florida* v. *Bostick*, 501 U.S. 429, 439 (1991) (whether police questioning aboard a bus constitutes a "seizure"); *Michigan* v. *Chestnut*, 486 U.S. 567 (1988) (whether investigative pursuit of suspect is a "seizure"); *Florida* v. *Royer*, 460 U.S. 491, 506 (1983) (whether detention in airport constitutes a "seizure"). In such a case, the degree and character of the intrusion on individual interests is relevant. Here, however, there is no question that a no-knock entry is a "search and seizure" that is subject to the Fourth Amendment.

The Court has also applied a totality-of-the-circumstances analysis in evaluating whether the police had probable cause, *Illinois* v. *Gates*, 462 U.S.

213, 238 (1983), or reasonable suspicion, *United States* v. *Cortez*, 449 U.S. 411, 418 (1981). But that analysis focuses on "the events which occurred leading up to the stop or search, and then [on] the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause." *Ornelas* v. *United States*, 116 S. Ct. 1657, 1661-1662 (1996). The Court has not held that the degree of intrusiveness with which the stop is carried out is one of the circumstances taken into consideration in determining the appropriateness of the decision to make the stop or search. Given *Richards*' holding that the reasonable-suspicion standard applies to the evaluation of no-knock entries, an examination of facts that the officers did not know (and perhaps could not anticipate) at the time they decided to enter, such as what property might be damaged, would be equally inappropriate here.

2. Although a totality-of-the-circumstances approach that takes into account the degree of breakage of property would be inappropriate in analyzing the reasonableness of officers' decision to dispense with the knock-and-announce requirement, that test is easily met in this case. The officers had significant justifications for entering without a prior announcement, in view of the officers' need to secure premises reasonably believed to be harboring an escaped convict who had already injured four people. See Pet. App. 19a-20a. Respondent's interests in avoiding a violent confrontation based on a mistaken impression that the entering officers are criminal intruders and in reducing embarrassment or fright from sudden entry are no different from any person's similar interests, both of which may be overcome by officers'

reasonable suspicion. See *Richards*, 117 S. Ct. at 1421. As for the homeowner's interest in avoiding the needless destruction of property, the value of respondent's garage door windowpane is *de minimis*. Thus, even were this Court to conclude that the reasonableness of the no-knock entry must be demonstrated by the totality of the circumstances, that showing is satisfied in this case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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SEPTEMBER 1997

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. CR 94-379HA
INDICTMENT
[18 U.S.C. § 922(g)(1)]

UNITED STATES OF AMERICA
v.
HERNAN RAMIREZ, DEFENDANT

[Filed Nov. 22, 1994]

THE GRAND JURY CHARGES:

On or about November 5, 1994, at Boring, Clackamas County, in the District of Oregon HERNAN RAMIREZ, defendant herein, who had previously been convicted of a crime punishable by imprisonment for a term exceeding one year, as defined in Title 18, United States Code, Section 921(a)(20), namely:

(1) Rape by Force and Violence, on or about May 5, 1978, in the Superior Court of the State of California for the County of Los Angeles, case no. A556567;

(2) Burglary of a Residence While Armed with a Firearm, on or about April 2, 1982, in the Superior Court of the State of

California for the County of Los Angeles, case no. A560936; and

(3) Unlawful Use of Force upon a Peace Officer, on or about July 12, 1983, in the Superior Court of the State of California for the County of Riverside, case no. CR-21026;

did knowingly possess a firearm, namely one or both of the following:

a. a Steyer Mannlicher semiautomatic pistol, SSP 9 X 19, bearing serial number 22504; and

b. a Lorcin semiautomatic pistol, model L380, .380 caliber, serial number 280594;

both of which firearms had previously been transported in foreign and interstate commerce; all in violation of Title 18, United States Code, Section 922(g)(1).

DATED this 22 day of November, 1994.

A TRUE BILL:

/s/ BEVERLY SAUNBERG
BEVERLY SAUNBERG
FOREPERSON

KRISTINE OLSON ROGERS
United State Attorney

/s/ STEPHEN F. PEIFER
STEPHEN F. PEIFER
Assistant United States Attorney